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The Supreme Court of the United States

OCTOBER TERM, 1933.

No. 114.

THE STATE CORPORATION COMMISSION FOR THE STATE OF KANSAS, HOMER HOCH, JESSE W. GREENLEAF, ET AL.,
APPELLANTS,

vs.

THE WICHITA GAS COMPANY, HUTCHINSON GAS COMPANY, NEWTON GAS COMPANY, and CITIES SERVICE GAS COMPANY, ET AL.,
APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEE, CITIES SERVICE GAS COMPANY, ON QUESTIONS ARISING ON ORAL ARGUMENT.

The tergiversation of appellants is obfuscating. Their chameleonic dexterity makes it difficult to trace their tortuous path. Like the parricide pleading for protection and mercy from the sentencing court because he is an orphan, they seek to capitalize their own perpetrated wrongs and gain a positive advantage by their own confessions. The penitent becomes greater than the inno-

cent. Absolution not only for wrongs confessed, but immunity from expiation of concomitant transgressions is claimed because of the confessions.

Appellants claim that after confession of wrong, without reparation by rescission or any step to remove the detriment to the business of the pipeline company, the case became moot and should have been dismissed.

The distributing company appellees have claimed that as to them the appeal became moot by reason of changed conditions, as the N. R. A., and other things recited in their brief.

Cities Service Gas Company has not claimed or conceded that the case below was moot in any phase or that the appeal is so; but if the court below acted on an inane, innocuous thing, without binding force for or against anyone, as contended by appellants in this court, in contradiction of their contentions in the trial court, as they confessed in answer to pungent questions propounded by them by members of this court, then such action by the trial court in enjoining the enforcement of it was certainly harmless, and if it was error, surely it was harmless error. We know of no court that reverses or modifies the decree of a trial court because of technical error that is harmless, a purely academic thing.

Appellants deliberately admitted in oral argument in this court that the findings as to fair price of gas and the orders to distributing company appellees to refrain from entering upon their books or considering in their rates charged more than thirty cents per m. c. f. were not res

judicata and had no inherent binding force upon anyone. They claimed that it was only one step on an uncharted course, which they now say led to seperate rate hearings; that they only intended to use the information gathered as evidence in such hearings. This is novel and ingenious. The testimony might be of value to use in such hearings, but of what use would the finding be as evidence if the proceeding was not completed and if it bound no one and of what use would the order to deal with nothing above thirty cents for gas either as to book entries or charges to customers be as evidence. It is an anomaly for the initiator, the prosecutor, in fact, who also happens to be the judge or trier and decider in this proceeding, to pause in media res just long enough to emit a finding and order concluding the precise point to be determined, in order that such finding and order might be used as evidence in deciding the question decided by the finding used to assist in deciding the question decided by the finding. The old masters dubbed such process circulus in probando.

We believe the moment appellants conceded that nothing done by the Commission had any binding force for or against anyone, their appeal became moot and subject to instant dismissal, not only because by such admission they admitted that the trial court had done a harmless thing—and no one is aggrieved by a harmless error—but also because the decree of the court did not purport to prevent or obstruct their using the evidence and testimony gathered in any manner they saw fit, either

in another "step" of the proceeding which appeared to be decided but which appellants now claim was not decided at all but was merely a preliminary flourish or fanfare to call all persons to the real hearing unsuspected, unannounced and uncharted, or in any other manner. This court is well justified in dismissing this appeal because the decree of the court below does not prevent appellants from doing all that they now deliberately profess, and have orally told this court, they wish or intend to do.

While we feel, from the evidence, that if this suit had not been brought and any of our customers (the distributing companies) had entered on their books more than thirty cents, had recorded therein a bill for forty cents, had considered more than thirty cents in their charges to their customers, that such customer would have felt the pains and penalties provided for disobedience of orders, yet since appellants now disavow such intent, the decree challenged by their appeal does not aggrieve the distributing companies.

Appellants persist in ignoring the suit and decree of Cities Service Gas Company. It was consolidated with the other suit merely for convenience of trial. We lost no rights by such consolidation. Our decree is just as binding as that in favor of any other party to this consolidated case. While we have not moved to dismiss because no citation was served on us and no chance given to us to participate in the selection of the portion of the record to be certified up or the portion to be printed, yet

we do protest against any attempt to tie our fortunes to those of other appellees or to bind us by any statement not made by us or adopted by us.

While we have not claimed that either the case or the appeal is moot we do contend that the case can be decided by this court without a decision of the questions as to the value of our properties, our proper expenses or what is a reasonable profit for us to ask for our product. Indeed we do not think a decision of those things is necessary in the least to support the decree of the trial court.

A skeleton outline of events will be persuasive as to what the Commission was intending and attempting to do and what they were doing to us when we sued.

In quick succession came the decision of Smith vs. Illinois Bell Tele. Co., 282 U. S. 133, the enactment of Chap. 239, Session Laws of 1931 of Kansas and the calling of this hearing by appellants to determine the reasonableness of our contracts with affiliated customers. If appellants then thought any other law of Kansas authorized them to hold any hearing upon the question of what a utility should pay for what it used, as for instance typewriter ribbons, lead pencils, stationery or any other necessary supplies, then why did they carefully segregate only our customers who were affiliates? No other law of Kansas than said Chapter 239 differentiated between transactions between affiliates and those with strangers. The highest court in the then circuit containing Kansas had solemnly decided that a public service commission had no business to interfere with con-

tracts for supplies bought by the utility from others, but that its only proper function was to deal with and regulate its transactions with those it served, its customers, the public.

Henry Oil Co. vs. The City of Nowata, (8th Circuit) 269 Fed. 742.

The appellant was affected with knowledge of this decision, and it is fair to presume that their counsel actually knew it. This makes it very persuasive, conclusive in our own minds, that the Commission intended to proceed under Chapter 239, the new law. If not, why not?

The Commission grounded its jurisdiction upon the affiliated relation. (R. 73)

The notice of the hearing said nothing concerning a rate hearing. It was, "concerning the reasonableness of contracts and charges made by holding companies to subsidiary companies of the Cities Service Company." (R. pp. 25-27) The body of the order made no mention of rates or a rate hearing. The title and body indisputably show that the Commission set out to do just exactly what it did: find the contract of this appellee for sale of gas unreasonable, lop off the alleged excess, direct our customers to discontinue recording or considering such excess and ordering them to pass on the amount saved, by the reduction in our price, to the consumers. The notice, the proceeding, the order (first an integral one and on rehearing a cloven or bifurcated one, the same as the first, mutatis mutandis, except there are two title assemblies and two sheets of paper) all show

without dissimulation or equivocation that there was to be no rate hearing; that the contract price of gas bought was to be lopped off by 25% and that same amount was to be subtracted from aggregate sales price to consumers unless cause could be shown against such result at a date too late to appeal from the order as to price to be paid to us and to be charged to the consumer.

Our business was a single one and was interstate. If the decision of this court in the Kansas Natural cases cited in our brief were no longer res judicata because of lapse of time and possible change of condition, still the answers of counsel for appellants, on the argument, to the Chief Justice of this court as to whether our business was interstate and whether the Commission had jurisdiction over us, have irrevocably settled those questions in this court for this case. They squarely and explicitly admitted our interstate status and that they had no power to regulate our business.

We alleged, and the record shows, diversity of citizenship, that the controversy involved more than $3,000, in our suit. We alleged illegal impairment of our contracts, unlawful interference with interstate commerce, deprivation of property without due process. For the District Court to have jurisdiction diversity of citizenship and the requisite magnitude of controversy were all that were necessary. To obtain the relief asked irreparable injury and inadequacy of legal remedy should, and did, appear. Because unconstitutionality of the order sought to be enjoined was alleged a three judge court was called, composed of two circuit judges and one district judge.

On oral argument counsel for appellants claimed that the Trial Court had no jurisdiction when the decree was entered. They now in supplemental brief admit they had jurisdiction and that instead of claiming a dismissal to be proper when they confessed their illegal acts, they now claim that the court simply went too far and that this court should modify the decree below. They do not now nor have they in their original brief nor did they in the oral argument show wherein the decree harmed them nor how they are aggrieved.

If the acts of appellants were unlawful and did us irreparable injury and we had no adequate remedy at law, then regardless of constitutional questions, or the reasonableness of our contracts we were entitled to the decree that was rendered. Since appellants admit jurisdiction of the court at the inception of the trial we spend no time on that. Jurisdiction once granted in a court of equity it will decide all questions necessary to a complete determination of the action. If the case can be decided on other than constitutional grounds the court will do it.

If, however, as appellants contend no constitutional question is involved in the portion of the decree appealed from then this appeal should be dismissed because it should have been taken to the Circuit Court of Appeals. In re: Buder, 271 U. S. 461.

Appellants in their supplemental brief do not in reality challenge the power of the court to decide, but really say that the court improperly exercised that power in that it decided wrongly instead of rightly; in that it en-

joined the enforcement of an order that the Commission did not intend to enforce against anyone; in that it prevented them from doing what they did not wish to do. They asked this court to prevent the trial court from preventing them from doing a thing they do not wish nor intend to do. If our analysis is correct we feel that this court will not feel called upon to settle such an academic question.

But we contend the decree was right and was necessary. Ab initio the proceeding was illegal. The Commission being a creature of statute, unknown to the common law had no powers except those the statutes gave it. They gave none to impair the obligation of a contract by a direct assault upon it. That the contract was one at the will of the parties makes no difference. As was said by this court in Truax vs. Raich, 239 U. S. 38, 60 L. Ed. 134, "The fact that the employment is at the will of the parties, respectively, does not make it at the will of others."

That fact that a public utility cannot disable itself from obeying valid orders of a commission by making contracts surely does not render the other party to a contract subject to unlawful assaults upon the contract simply because it has contracted with a public utility. Had the Smith vs. Illinois Bell Tele. Co. case, 282 U. S. 133, under which doubtless said Chapter 239 was attempted to be framed, been followed or had the statute been followed, then there would likely have been no complaint on our part for probably any impairment of our

contracts, interference with our interstate commerce or taking of our property, would have been slight, remote, indirect and by due process; the corporate autonomy and power of management of our customers would not be destroyed and they would still be able, as other business corporations, to contract with us and buy our products if by the exercise of good business judgment they could so mould their affairs that they could meet the rate to the customer properly prescribed in a rate hearing and pay us a price which we would be willing to accept. If commissions can single out and directly strike at contracts concerning large elements of cost of operations of a public utility they can have hearings upon and directly strike down every contract or purchase a utility can make and pursuing the course to the end they will have directly prescribed the kind of contract or purchase a utility may make in each and every detail, in all of the minutiae of daily transactions. Public utilities will then have become mere puppets, marionettes, simulácra, and the limitations upon commissions in usurping control of the affairs of utilities so forcefully outlined by this court in the cases cited by us on pages 21 and 22 of our brief will have been circumvented and rendered nugatory. "'Tis Greece but living Greece no more" would become an appropriate epitaph for the dead hands of utilities that henceforth guide nothing. Then public ownership should supplant private ownership so that financial risk and responsibility may become the burdens of those who control.

Since it is agreed that the proceedings of the Commis-

sion, if carried to consummation, would take from us $1,926,145.07 annually (R. 373) then if this deprivation of property was unlawful, surely this court should uphold our decree upon such agreed fact alone. Resort to the merits involving the exact figure that would constitute confiscation would seem superfluous.

Injunction is prevention, not redress. It is idle to say our action is premature, to wait until harm is done. Who will repay us for loss? A multiplicity of suits might bring judgments, but if consumers refuse to pay to our customers bills based on items the Commission has ordered our customers not to "consider" in their charges to their consumers, bankruptcy for someone looms large, and since it is agreed by appellants that our business cannot continue without the patronage of our proscribed customers (R. 213), their bankruptcy would be the necessary forerunner of ours.

In Pierce vs. Society of the Sisters of the Holy Name of Jesus and Mary and the consolidated case of Pierce Military Academy, 268 U. S. 510, 69 L. Ed. 1070, where action was brought to enjoin enforcement of a statute that did not "become effective for two or three years" this court held that the action was not premature if demoralization or impairment of business was probable, saying that "These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and *prospective* patrons of their schools."

In Pennsylvania and Ohio vs. West Virginia, 262 U. S. 553, 67 L. Ed. 117, this court held that an injunction,

against enforcement of a law, brought eight days after its passage and before any steps had been taken to enforce it was not premature the court saying: "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Can there be any reasonable doubt that but for the institution of this suit, especially in the light of the confession of counsel for appellants on oral argument that they contended before the lower court that all findings and orders of the Commission would be res judicata upon our customers, that if our customers had entered our bills on their books as rendered and had "considered" such amounts in billing their customers, that they would have been proceeded against for violation of the orders of the Commission. Officers are presumed to do their duty and counsel *then* conceived it their duty to enforce those orders. True, the legality and binding force of laws or orders cannot be changed by talking about them, but the actual operations that would follow promulgation of orders would demoralize business even if the operator should afterward—long afterward, as counsel in this case have done, should conclude the operation of the order was harmless as it bound no one.

It is trite law that a litigant cannot seek reversal of a decree on a ground not presented to the trial court. This is but fairness to a busy court of first instance, where decision and action must be prompt and sometimes immediate. A fortiori no party should be allowed to procure a reversal upon a given point, where by reason of

his attitude before the trial court he led that court to believe a certain condition, course of conduct or result would ensue from his own act, and the court enjoined the act because of the confessed result, by a tergiversation before the reviewing court whereby he professes he was mistaken before the trial court. If there be error it is invited error. The equitable principle of estoppel applied should prevent the party from complaining of the result he had helped to cause. His attitude could not change the law, but he should be estopped from challenging the action of the lower court in enjoining a thing he now claimed harmed no one, which to the trial court he represented as potent of and pregnant with untoward effect. It is the threatened result that the trial court enjoins, not rightful legal result that would ensue. It is no ground for reversal for counsel to now state in open court that their position in the lower court was untenable and that the enjoined order was not, as was then claimed, absolutely binding.

Even if the enjoined order was void, we are entitled to be protected against its unlawful enforcement where plaintiff cannot by refusal to obey the order save itself from harm as was alleged in our petition. (R. 221)

For reason that the decree of the trial court prevented a wrong to us consisting largely of the manner of infliction of same and the further reason that appellants are estopped of complaining of the decree and are not really aggrieved thereby we respectfully contend that this court

is warranted in affirming the decree in favor of Cities Service Gas Company and that such affirmance should be had regardless of all other questions in the case.

Respectfully submitted,

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Cities Service Gas Company.